**GANFER SHORE LEEDS & ZAUDERER LLP**

# CLIENT ADVISORY

**OCTOBER 2022**

## CONDO BOARD IMPOSED ACCEPTABLE SAFEGUARDS FOR VALIDATING VOTES IN ELECTRONIC ELECTION

A condominium scheduled its annual election, allowing unit owners to vote by e-mail. To safeguard the voting process, unit owners were "required to authenticate the e-mail address they intended to use for voting in the election and to submit their proxy using an electronic form sent directly to" the condominium's accountants. A group of 68 unit owners objected to the new voting procedures, and instead collected paper proxies and attempted to submit them via e-mail attachment. These owners did not authenticate their e-mail addresses or submit their proxies via the specified electronic method. The condominium refused to count these proxies, and determined that there was no quorum so the existing board members would serve for another year.

The 68 owners brought a court proceeding challenging the election. They asserted that they had submitted valid proxies under the By-Laws, which provide that a unit owner may designate a proxy in a writing signed, dated, and delivered by the appointed time for the meeting. The board moved to dismiss the challenge, asserting that its electronic proxy voting procedures were authorized by recent amendments to the New York Not-for-Profit Corporation Law. (Unlike most condominiums in New York, the condominium involved in this case is incorporated.) These changes, adopted in response to the COVID pandemic, permit the Board in its discretion to conduct electronic meetings and to implement "reasonable measures" to "verify that each person participating electronically is a member or a proxy of a member." The 68 unit owners replied that in the event of a conflict between the By-Laws and the Not-for-Profit Corporation Law, the By-Laws should prevail.

The court agreed with the board and dismissed the lawsuit, holding that the intent of the legislation was to allow entities to carry on business despite the pandemic conditions. While the 68 unit owners disputed the reasonableness of the validation measures the board implemented, the board's decision-making was protected by the Business Judgment Rule, which "prohibits judicial inquiry into the actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purpose." The court concluded that "the email verification procedure required owners to fill out a short form in which they were required to list their unit number, unit owner(s), the email address they wanted to have on file, and to sign and date the form. Such procedure was, in the Court's view, reasonable as a matter of law and the business judgment rule prevents any further judicial scrutiny…." The court also noted that the 68 owners had not even attempted to comply with the instructions for submitting proxies.

Significantly, the Legislature has now made the authorization of electronic voting in co-op and condo elections permanent, as previously discussed in this *Client Advisory.* This includes a requirement that those conducting the election take reasonable measures to confirm the identity of people casting votes electronically.

The unit owners also sought access to books and records. The court found that unit owners' names and addresses had already been provided but that "petitioners have not established their entitlement to disclosure of the telephone numbers and e-mail addresses for the unit owners." The court also observed that the Not-for-Profit Corporation Law requires corporations to furnish annual and interim financial statements, but not bank statements or contracts. **Matter of Lifesavers Building Homeowners Group v. Board of Managers of Landmark Condominium, Index No. 67545/2021 (Sup. Ct. Westchester Co. May 23, 2022)**.

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## COOPERATIVE PROPERLY TERMINATED TENANT-SHAREHOLDER'S PROPRIETARY LEASE FOR OBJECTIONABLE CONDUCT

A tenant-shareholder sought a preliminary injunction against a cooperative's termination of his proprietary lease. The directors voted to terminate the proprietary lease for objectionable conduct that included making rude comments to fellow residents, shouting profanities in the presence of young children, harassing and screaming at a pregnant woman, yelling at other residents, and taking cellphone photographs of a toddler who was unclothed. The objectionable conduct also included repeatedly filing baseless complaints against other residents, some of which were refuted by security camera footage, and harassing the building staff and property manager. The tenant-shareholder denied all the alleged objectionable conduct and asserted that he had issues with his neighbors because they allegedly smoke marijuana, which harms one of his children, who suffers from autism. The tenant-shareholder also asserted that the cooperative was retaliating against him because he submitted a demand for inspection of books and records following a maintenance increase.

The court denied the injunction. To obtain a preliminary injunction, a plaintiff must establish, among other things, a likelihood of success on the merits. Here, the termination of plaintiff's proprietary lease is governed by the Business Judgment Rule, and could only be overturned if the court found that the Board acted in bad faith or did not comply with the termination procedures of the lease. There was "no dispute that [the cooperative] did what it was supposed to do," including convening a special meeting at which plaintiff was afforded ample opportunity to present his side of the story. The court further observed that the objectionable conduct involved not merely a single incident, but a pattern of misconduct that continued after prior warnings. "A co-op is certainly entitled to seek the removal of a leaseholder where it contends that there is a documented history of misconduct spanning multiple years." Plaintiff's challenge to the termination could not succeed where "the evidence presented shows a well-documented process whereby [the cooperative] informed plaintiff about his objectionable conduct over the last few years, gave him a chance to shape up and ultimately decided to take action when he did not." **Haimovici v. Castle Village Owners Corp., Index No. 156094/2022, 2022 N.Y.L.J. LEXIS 956 (Sup. Ct. N.Y. Co. Sept. 7, 2022)**.

## PANDEMIC DID NOT EXCUSE PURCHASERS' FAILURE TO CLOSE; SELLERS RETAIN DOWN PAYMENT, BUT ARE NOT AWARDED INTEREST

The parties contracted for the purchase and sale of a condominium apartment. The purchase agreement contained the customary provision that if the purchasers defaulted, the sellers would retain the purchaser's down payment as their exclusive remedy. The seller set a "time of the essence" closing date and the purchasers failed to appear or close. The sellers brought a lawsuit seeking a court determination that purchasers had defaulted and sellers were entitled to retain the down payment, plus prejudgment interest at the statutory rate.

Purchasers argued that their performance should be excused because they were allegedly unable to gain access to the apartment beginning on March 16, 2020 due to restrictions imposed by the condominium during the pandemic. However, the purchasers did not submit documentary evidence supporting this defense or details as to when and how often they requested access and were denied. In any event, the access restrictions were largely removed by June 21, 2020, which was two and one-half weeks prior to the closing date. The court concluded that "frustration of performance and impossibility of performance are not occasioned by temporary restrictions on the parties' ability to perform."

Thus, sellers were entitled to the down payment. However, the court rejected sellers' claim for interest, because the contract provided that sellers' "sole remedy" was to retain the down payment. The court also denied sellers' claim for attorneys' fees, because the contract did not contain any attorneys' fees provision. **Lee v. Hootnick, Index No. 652973/2020, 2022 N.Y.L.J. LEXIS 1305 (Sup. Ct. N.Y. Co. Sept. 1, 2022)**.